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Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

CRIMINAL APPEAL NO.397 /2005.

APPELLANT (In Jail) : Siraj @ Sirajuddin S/o. Seikh Tej Mohammad, Aged about-42 years, R/o. Village-Gumka, P.S. Prem Nagar, District- Surguja (C.G.)

VERSUS

RESPONDENT : State of Chhattisgarh, Through : Police Station House Officer, P.S. : Kansabel, District.- Jashpur (C.G.)

APPEAL UNDER SECTION 374 (2) OF CRIMINAL PROCEDURE CODE

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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 397 of 2005

Appellant :- **Siraj @ Sirajuddin**

Vs

Respondent :- **State of Chhattisgarh**

Appellant by Shri J.K.Shastri, Advocate.
State by Shri D.K.Gwalre, Panel Lawyer.

JUDGEMENT
(Delivered on 06 **/10/2005)**

Dhirendra Mishra, J

Appellant namely Siraj @ Sirajuddin, R/o village-Gumka, Police Station-Prem Nagar, Distt-Surguja, has preferred this appeal against the judgment dated 28.04.1999 passed by the learned Additional Sessions Judge, Jashpur (C.G.) in Sessions Trial No. 18/99 and by which the appellant has been convicted under Section 394/34 of the IPC and sentenced to undergo RI for 10 years and to pay a fine of Rs. 40,000/- and under Section 397/34 of the IPC, RI for 10 years and fine of Rs.20,000/-, in default of payment of fine, further RI for 2 ½ years has been awarded to the appellant and all the sentences are directed to run concurrently.

2. The incident took place on 14th December 1997 at about 8.00 p.m. at Tirang Nala near Bataikela when the businessman Preetamchand Agrawal (P.W.1), resident of Patthalgaon was returing from Bageecha by jeep and was proceeding towards Patthalgaon. At the time of incident, Preetamchand was carrying Rs.60,000/- recovered by him from his clients, one Pradeep Agrawal (P.W.3) who was carrying Rs. 21,500/- and a bag having 13-14 new saris, was also traveling in the said jeep. The jeep was being driven by Kamal Chouhan and in the said jeep Lalli Maharaj, Gokul Agrawal and two ladies were also sitting and the complainant Harish Pandey (P.W.2) joined them on the way. Just 7-8 kilometers ahead of Bataikela, near Tirang Nala, they saw that three persons had stationed their red coloured new Hero Honda (Splender) motorcycle without number plate across the bridge of the Nala and had

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also placed big stones on way. All the accused persons were aged between 20 and 26-27 years. When the jeep was stopped by the driver, the miscreants came near the jeep and abused Preetamchand and demanded money. When Preetamchand resisted, they dragged Preetamchand and Kamal Chouhan from the jeep and fired by country-made pistol on the right arm of Preetamchand. The accused also assaulted Kamal Chouhan and Lalli Maharaj by fists and threatened them to blow the jeep with bomb and in the process, looted two bags from Preetamchand and Pradeep containing money. They also took away the bags containing saris and the bags of the ladies. However, they returned the papers of Preetamchand and thereafter fled from the scene of occurrence.

3. Harish Pandey (P.W.2) lodged the FIR of Ex.P/2 at about 9.00 p.m. on the same day against three unknown persons. However, he stated that he would recognize them on coming face to face. Assistant Sub-Inspector G.R.Bhagat (P.W.10) recorded the FIR and prepared spot map of Ex.P/14. The injured Preetamchand was treated by Dr.Y.K.Toppo (P.W.4) on 14.12.1997 and in his report he has stated that he found an injury from which blood was oozing, on the right arm which may be caused by bullet shot. The report of the doctor is Ex.P/4. The doctor had also examined Pradeep Agrawal on 16.12.1997, but however, no injuries were found on his person by him, though Pradeep Agrawal complained of having sustained injuries on 14.12.1997 on his person in the said incident. The diary of the crime was entrusted to Sub-Inspector B.B.S. Rajput (P.W.8) on 31.12.1997 and during investigation he learnt that three persons had gone to the house of one Kalim on a motorcycle. On enquiry from Kalim, he learnt that the appellant is his brother-in-law and the appellant was accompanied by Javed @ Roshan, resident of village-kete, P.S.-Premnagar and Kayamuddin, resident of Rampur Basti, Korba. Thereafter, when the house of Kayamuddin was raided, the appellant was caught and other two accused persons could not be arrested as they had left for Banda (U.P.) and did not return. During investigation, on the basis of memorandum of Sirajuddin-the appellant, the motorcycle used in the above crime was recovered from Aretara forest, vide recovery memo of Ex.P/8. The memorandum of the appellant is Ex.P/6 and on the basis of

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the said memorandum, cash amount of Rs.985 and other wearing apparels vide document of Ex.P/7 were also seized.

4. On 02.01.1998, the house of Kayamuddin was also raided, but however, Kayamuddin was not in the house and a lady namely Radha Bai informed that Kayamuddin has just run away from the house, leaving a suitcase which was seized by the police vide document of Ex.P/10. The suitcase contains saris and cash of Rs. 15,750. On search of house of absconding co-accused Javed on 25.03.1998, saris and other clothings were recovered vide document of Ex.P/11. After investigation, the police filed a charge sheet against the appellant and other two accused persons namely Kayamu @ Kayamuddin @ Firoz Khan @ Rais Khan and Javed @ Roshan, showing the other two accused persons absconding.

5. Test identification parade was conducted by Nayab Tehsildar on 04.01.1998 vide document of Ex.P/1. Identification of the articles seized from the appellant on his memorandum, was also conducted on 31.03.1998 vide document of Ex.P/3. The appellant was correctly identified by Preetamchand, Pradeep and Kamal Chouhan whereas the seized articles were also correctly identified by Pradeep Kumar Agrawal. The prosecution examined in all 10 witnesses in support of its case.

6. After committal, the appellant faced trial for the offence under aforesaid sections before the Additional Sessions Judge who framed charges under Sections 394/34 and 397/34 of the IPC. The appellant abjured his guilt. The defence of the appellant is that he is innocent and he has been falsely implicated in the above crime. Regarding identification by Preetamchand, the appellant has stated that he was arrested from his house and was taken to Patthalgaon which is 13 k.m. away from his house and Preetamchand had already seen him. He further stated that the witnesses had already seen him in the police station. The appellant denied seizure of any article alleged from him as per seizure memos. However, no defence witness has been examined.

7. Learned trial Court has relied upon the statements of P.W. 1 Preetamchand, P.W. 2 Harish Pandey and P.W. 3 Pradeep Agrawal and held that the appellant is guilty of the above offences and charges leveled against him are proved on the grounds that the appellant was correctly identified in the test identification by P.W. 1, P.W. 3 and that on the

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memorandum of the appellant, looted articles were seized and accordingly, convicted him as above.

8. Learned counsel for the appellant has mainly challenged the finding of the trial Court on the ground that as per FIR of Ex.P/2, all the miscreants had covered their faces through towel and therefore, it was not possible for the witnesses to recognize them and further that the officer who has conducted test identification parade, has not been examined, therefore, the Court below ought not to have relied upon the test identification. He further submits that in the absence of proper identification of the appellant, benefit of doubt ought to have been accorded to the appellant. It is argued that the articles allegedly seized on the memorandum of the appellant, were put to test identification by one Ajay Kumar Goyal (P.W.6), but however, it is not clear as to under what authority said Ajay Kumar Goyal conducted test identification of the seized articles as document in question does not mention that he was entrusted this job by the Investigating Officer and thus seizure of the looted articles on the memorandum of the appellant, looses its significance in the absence of proper identification of the same. He further submits that none of the articles which were seized during investigation, was produced during trial and as such, the appellant could not be held guilty by relying upon the seizure of aforesaid articles. He also submits that the memorandum of the appellant was recorded on 03.01.1998 whereas the appellant was arrested only on 04.01.1998, therefore the memorandum was recorded by the police when the appellant was not in custody and any recovery on the basis of such memorandum has no legal value.

9. In support of his contention learned counsel for the appellant places his reliance in the judgments of the Hon'ble Apex Court reported in ***AIR 1998 S.C. 2811*** delivered in the matter of ***Manoranjan Singh Vs. State of Delhi*** and ***AIR 1986 S.C. 1438*** delivered in the matter of ***Abdul Sattar Vs. Union Territory, Chandigarh***.

10. On the other hand, learned counsel for the State supporting the impugned judgment of conviction submits that the appellant was taken into custody on 03.01.1998 itself which is evident from para-8 of the statement of Investigating Officer (P.W.8), however, the appellant was formally arrested on 04.01.1998 after recovery and thus the appellant was in custody when his memorandum was recorded. He further submits that so far as the

identification of the appellant is concerned, though the incident took place at about 8.00 p.m. in the night, but witnesses had ample opportunity to see the faces of the miscreants through headlight and light in the cabin of the said jeep and the witnesses have categorically stated in their statements that the headlight was on. P.W. 1 as also P.W. 3 have denied the suggestion of the prosecution that the miscreants had covered their faces at the time of incident and P.W. 1 has also denied the suggestion that he could recognize the appellant as he had seen him in the police station or in the Nayab Tehsildar office. He further argued that on the memorandum of the appellant, four saris and one lungi have been seized vide Ex.P/7 and motorcycle was seized vide Ex.P/8 and the said memorandum as also the seizure; have been duly proved by the statement of Lakhanlal (P.W. 5). Apart from seizure, on the memorandum of the appellant, other articles of loot were also seized from the house of Javed and Kayamuddin and thus in totality, the evidence available on record go to show that the prosecution has proved its case beyond all reasonable doubts.

11. I have heard learned counsel for the parties.

12. So far as the incident is concerned, it is undisputed that it took place as alleged by the prosecution. It is not disputed that Preetamchand was looted of Rs.60,000/- and he also sustained bullet injury and P.W. 3 Pradeep Agrawal was also looted of Rs. 21,500/- and other clothings. The only question to be decided is as to whether the identification of the appellant by the witnesses is worth reliance or not.

13. As for the identity of the appellant, the statements of witnesses in the Court are the only substantive piece of evidence to establish the identity of the appellant and the test identification parade conducted during investigation is the only corroborative piece of evidence, which corroborates the statements of the witnesses. In the present case, P.W. 2 Harish Pandey has stated in his report of Ex.P/2 that he shall recognize the accused persons, if they come face to face. Similarly, P.W. 1 and P.W. 3 have stated in their court statements that they saw the faces of all the three miscreants in the headlight of the jeep. P.W. 1 has described the injury over the faces of the absconding accused and he has categorically denied the suggestion of the defence that the accused persons had covered their faces by clothes. He has further stated that at

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the time of test identification, he could recollect the face of one of the miscreants-the appellant, because the face of the appellant was familiar to him as he had seen him selling eggs in Bataikela, however, he was not in a position to recognize the appellant immediately after the incident as the appellant, when he saw him about one year prior to the date of incident, was bearing beard, but when he saw the appellant during test identification, he stated for certainty that the appellant was one of the miscreants. The version of Preetam is duly corroborated by the statement of Pradeep Agrawal, who has also correctly identified the appellant in the test identification parade. The above evidence is further corroborated from the recovery of the motorcycle on the memorandum of the appellant, which was used for the commission of the offence by the accused persons and also the saris and other wearing apparels, which have been seized from the custody of the appellant on his memorandum.

14. Thus, on the basis of the aforesaid analysis, I am of the opinion that the prosecution has proved the charges beyond all reasonable doubt and the impugned judgment of conviction does not call for interference.

15. Taking into consideration that the Court below after convicting the appellant under Sections 394/34 and 397/34, has sentenced him to undergo RI for 10 years on each count and to pay a fine of Rs. 40,000/- and 20,000/- respectively and that the appellant has already undergone jail sentence of seven years and nine months as he is in jail since 04.01.1998, I am of the opinion that the ends of justice will be served if the above sentence imposed upon the appellant is modified and reduced to the period already undergone by him. Accordingly, looking to the age of the appellant and further considering the fact that he has already undergone a major part of the jail sentence imposed upon him, the sentence imposed upon him is reduced to the period already undergone by him and it is directed that he shall be released forthwith, if he is otherwise not required to be detained in connection with some other offence.

Sd/-
Dhirendra Mishra
Judge